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Nos. 218

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

YELLOW CAB COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

YELLOW CAB COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

218

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The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered in the above-entitled cases on April 27, 1950.

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania on the pleadings and proof (R. 24-25) and on the motion of the United States to set aside the verdict (R. 28-31) are not reported. The opinion of the United States Court of Appeals for the Third Circuit (R. 65-75) is reported at 181 F. 2d 967.

JURISDICTION

The judgments of the Court of Appeals were entered on April 27, 1950 (R. 75, 76). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Tort Claims Act authorizes impleading the United States as a third-party defendant.

2. Whether the Tort Claims Act subjects the United States to liability for contribution to a joint tortfeasor.

STATUTE AND RULE INVOLVED

Pertinent portions of the Federal Tort Claims Act, in its original form (60 Stat. 842, 28 U. S. C., 1946 ed., 931 *et seq.*),[1] and Rule 14(a) of the Fed-

[1] Under the revision of the Judicial Code (Act of June 25, 1948, 62 Stat. 869), the provisions of the Tort Claims Act now appear in Sections 1291, 1346(b), 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671-2680 of Title 28, United States Code. Since the accident involved in this litigation occurred before the effective date (September 1, 1948, see Section 38 of the Act of June 25, 1948, 62 Stat. 992) of the new Judicial

eral Rules of Civil Procedure are set forth in Appendix A, *infra*, pp. 10-13.

STATEMENT

These two actions arose out of a collision on December 1, 1946, at a street intersection in Philadelphia, Pennsylvania, between a taxicab, owned by respondent and driven by its employee, and a United States mail truck driven by a Government employee (R. 5, 12, 15, 19, 36, 45, 49, 53). The original plaintiffs were passengers in the taxicab at the time of the collision. Predicating federal jurisdiction upon diversity of citizenship and amounts in controversy exceeding $3,000, they brought suit against respondent in the United States District Court for the Eastern District of Pennsylvania, alleging that they had been injured as a result of the negligence of respondent's driver (R. 5, 36). Respondent sought and obtained leave to implead the United States as a third-party defendant in both actions, claiming that the United States was or might be liable to it for all or part of the plaintiffs' claims (R. 7, 9, 39, 41).

Following denial of motions by the Government to dismiss the third-party complaints on the ground that they asserted derivative claims unauthorized

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Code, we assume with the court below (R. 68) that the original formulation of the Tort Claims Act is applicable here. As indicated below, however (see footnote 6, *infra*, p. 7), we believe that the slight differences in language between the original Act and the sections of Title 28 which reenact it are immaterial to the questions presented herein.

by the Tort Claims Act, the cases were consolidated and tried to the court without a jury (R. 17, 18, 51, 52, 24-25, 28). The court concluded that both the taxicab driver and the mail truck driver had been negligent, awarded judgments totaling $7,800 in favor of the plaintiffs against respondent, and entered judgments for one-half of this amount, $3,900, in favor of respondent against the United States (R. 24-25, 26, 51). The Government, contending that the court lacked jurisdiction over the United States as third-party defendant and that the third-party complaints failed to state claims upon which relief could be granted, moved to have the judgments set aside (R. 27). This motion was denied, the court holding that the Tort Claims Act authorized both joinder of the United States as a third-party defendant and the assertion against the United States by a joint tortfeasor of the substantive right to contribution recognized by state law (R. 28-31).

On appeal, the judgments of the district court were affirmed (R. 75, 76). First, the court below held, while there is "room for doubt," the Tort Claims Act "must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants." (R. 73). Secondly, the court concluded, the waiver of immunity in Section 410(a) of the Tort Claims Act to suits

"on account of personal injury" was broad enough to include consent to suits for contribution (R. 73-75).

REASONS FOR GRANTING THE WRIT

The holding below that the Tort Claims Act permits joinder of the United States as a third-party defendant in a suit between private litigants is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Capital Transit Co.* v. *United States,* No. 10467, decided June 5, 1950.[2] We believe that the court below has erred and that the construction of the Tort Claims Act announced in the *Capital Transit* decision is correct.[3] Of greater significance at the moment, however, is the existence of this conflict of decisions on an issue of general importance in the administration of the Tort Claims Act. We submit that both the question of joinder of the United States and the "closely allied question" (opinion below, R. 73), whether the United States is liable for contribution under the Tort Claims Act, merit review by this Court.

1. In *Capital Transit Co.* v. *United States, supra,* the Court of Appeals for the District of Columbia

[2] The Capital Transit Company has filed a petition for a writ of certiorari to review this decision. *Capital Transit Company* v. *United States,* No. 204, this Term. For the reasons set forth herein, the Government will not oppose the granting of the writ in that case.

[3] In Appendix B, *infra,* pp. 13-24, we have printed for the convenience of the Court the opinion of the Court of Appeals for the District of Columbia Circuit in *Capital Transit Co.* v. *United States, supra.* At least for the purpose of this petition,

Circuit, expressly recognizing (Appendix B, *infra*, p. 16) the conflict with the instant decision, held that the Tort Claims Act does not authorize impleader of the United States as a third-party defendant. Prior to the instant decision, the District of Columbia Court had already ruled on substantially the same problem when it held, in *Sappington* v. *Barrett*, 182 F. 2d 102, decided April 14, 1950, that a plaintiff in a tort action could not join the United States as a co-defendant. For, as both courts of appeals have indicated, the results of involving the United States as a defendant in a suit between private litigants are essentially the same whether the joinder is effected by the original plaintiff or by the private defendant suing as third-party plaintiff.[4]

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that opinion amply demonstrates, we believe, the incorrectness of the decision below.

[4] If the United States and a private defendant are joined by the plaintiff, they may assert cross-claims against each other. Fed. R. Civ. P. 13(g). If the joinder results from a third-party complaint, the original plaintiff and third-party defendant may assert claims against each other. Fed. R. Civ. P. 14(a), *infra*, pp. 12-13. Thus, however the joinder is initially accomplished, it tends ultimately to litigation in the same suit of (1) claims between original plaintiff and private defendant, (2) claims between original plaintiff and United States, and (3) claims between private defendant and United States.

Quite properly, therefore, both the court below and the District of Columbia Circuit have treated the two procedures as being substantially identical so far as the permissibility of their use against the United States under the Tort Claims Act is concerned. The court below states as its conclusion (R. 73) "that the FTCA must be construed to have authorized suits against the United States not only when the United States was the sole or single defendant but also when the United States was joined with another defendant or defendants." The District of Co-

The conflicting decisions of the two circuits deal broadly, therefore, with a problem growing out of a constantly recurring situation—an accident involving the Government and one or more private parties as alleged joint tortfeasors. The question whether the United States may be joined with other defendants in such circumstances has been presented in a number of cases under the Tort Claims Act and has produced a sharp divergence of views among the district courts as well as in the court of appeals decisions discussed here.[5] A ruling by this Court on this problem, which may be expected to continue to arise in the future, will forestall extensive litigation which must otherwise burden both the Government and private litigants.[6]

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lumbia Circuit, in *Sappington* v. *Barrett*, *supra*, wrote a *per curiam* opinion stating that the reasons for its conclusion would "be set forth in full in an opinion to be published at a later date," and supplied the promised explication in *Capital Transit Co.* v. *United States*, *supra*. See 182 F. 2d, at 103.

[5] Joinder denied: *Uarte* v. *United States*, 7 F.R.D. 705 (S.D. Cal.); *Drummond* v. *United States*, 78 F. Supp. 730 (E.D. Va.); *Donovan* v. *McKenna*, 80 F. Supp. 690 (D. Mass.); *Prechtl* v. *United States*, 84 F. Supp. 889 (W.D.N.Y.). Joinder permitted: *Englehardt* v. *United States*, 69 F. Supp. 451 (D. Md.); *Bulloch* v. *United States*, 72 F. Supp. 445 (D.N.J.); *Newsum* v. *Pennsylvania R. Co.*, 79 F. Supp. 225 (S.D.N.Y.).

[6] The importance of the conflict between the court below and the District of Columbia Circuit is not diminished by the suggestion in the opinion below (R. 68) "that the language of Section 1346(b) of revised Title 28, United States Code, may be somewhat narrower in effect than the pertinent portion of Section 410(a) of the FTCA * * *." As the notes of the Revisers show (H.R. Rep. No. 308, 80th Cong. 1st sess., p. A123), the slight changes from Section 410(a) to 28 U.S.C. 1346(b) were intended as nothing more than "changes * * * in phraseology." There is no basis for supposing that, with noth-

2. In the *Capital Transit* case, having held that the maintenance of a third-party action against the United States was not authorized by the Tort Claims Act, the Court of Appeals for the District of Columbia Circuit deemed it unnecessary to decide whether the Act authorized imposition upon the Government of liability for contribution to a joint tortfeasor (Appendix B, *infra*, p. 24. While there is thus no present conflict of decisions on this point,[7] the question is, as the court below observes (R. 73), closely related to that of joinder. For the substantive goal of an attempt to implead the United States as third-party defendant is the recovery from the United States of all or part of the original defendant's liability by way of indemnity or contribution. Like the problem of joinder, then, claims for contribution are normal incidents of the many cases involving joint tortfeasors, and are bound to recur repeatedly in federal tort claims litigation until the issue is authoritatively settled.

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ing more than this laconic reference to "phraseology," Congress intended so substantial an amendment as a withdrawal of consent to joinder which it considered the original Act to have granted. The *Capital Transit* opinion refers to the Title 28 revision merely as "codifying the major sections of the Act" (Appendix B, *infra*, p. 13, fn. 1) and appears to treat the two versions as interchangeable.

The same observations would apply with reference to the second question in the instant cases—the permissibility *vel non* of suits for contribution.

[7] But see *Drummond* v. *United States*, 78 F. Supp. 730, 731 (E.D.Va.); *Niagara Fire Ins. Co.* v. *United States*, 76 F. Supp. 850, 855 (S.D.N.Y.).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

ARNOLD RAUM,
Acting Solicitor General.

JULY, 1950.

APPENDIX

1. The Federal Tort Claims Act (60 Stat. 842), as originally enacted (see footnote 1, *supra*) provided, in pertinent part, as follows:

> SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent

as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim.
* * *

SEC. 411. In actions under this part, the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the rules promulgated by the Supreme Court pursuant to the Act of June 19, 1934 (48 Stat. 1064); and the same provisions for counterclaim and set-off, for interest upon judgments, and for payment of judgments, shall be applicable as in cases brought in the United States district courts under the Act of March 3, 1887 (24 Stat. 505).[8]

'SEC. 412. (a) Final judgments in the district courts in cases under this part shall be subject to review by appeal—

* * * * *

(2) in the Court of Claims of the United States * * *

* * * * *

[8] In the codification of Title 28, the provision for applicability of the Federal Rules of Civil Procedure was omitted as surplusage, "since other provisions of the title provide that tort claims shall be asserted in civil actions, and that the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions." S. Rep. No. 1559, 80th Cong., 2d sess. (Amendment No. 61).

> SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title.[9] * * *

2. Rule 14(a) of the Federal Rules of Civil Procedure provides as follows:

> Before the service of his answer a defendant may move ex parte or, after service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the

[9] Under 28 U.S.C. 2401(b), as amended by Section 1 of Pub. L. No. 55, 81st Cong., 1st sess., April 25, 1949, the limitation period is now two years.

plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

APPENDIX B

Opinion of The United States Court of Appeals for the District of Columbia Circuit in Capital Transit Co. v. United States, No. 10467, Decided June 5, 1950

Washington, *Circuit Judge:* This case presents the question whether under the Federal Tort Claims Act [1] the United States may be joined as a third party defendant in a suit between private litigants, when the purpose of such joinder is to

[1] Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, as amended. See 28 U.S.C. (1950 ed.) §§ 1346(b), 2671-2680 (codifying the major sections of the Act).

secure contribution from the United States as a joint tort feasor.

The plaintiff, Kenneth Neil Stradley, filed suit for damages for personal injuries against the Capital Transit Company, appellant here, alleging negligence. Capital sought and obtained leave of court to make the United States a third party defendant, alleging that the negligence of a Government employee was the sole or the contributing cause of any injury which plaintiff sustained, and requesting that the United States be held liable for a contributable portion of any sum which might be adjudged against Capital in plaintiff's favor. Upon motion by the United States to dismiss the third party complaint for failure to state a cause of action upon which relief could be granted, the District Court entered a final judgment dismissing that complaint with prejudice.

The Federal Tort Claims Act provides, in part, as follows:

> "Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee

> of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees." (Section 410(a), act of August 2, 1946, c. 753, Title IV, 60 Stat. 842).

The District Court in dismissing the third party complaint held that a suit for contribution was not one for "money damages for * * * personal injury or death," within the meaning of the Federal Tort Claims Act. Capital contends that this judgment was erroneous in that it too narrowly construed the waiver of sovereign immunity contained in the Federal Tort Claims Act; that the Act specifically provides that the United States shall be liable to the same extent and in the same manner as a private person; that the clear intendment was that local law should determine whether there is a right of contribution by the joint tort feasors; and that under the law of the District of Columbia, if the United States were a private per-

son, it would be liable for contribution under the circumstances here presented. Appellant further argues that under the Act the United States has made itself amenable to the third party practice provided for in the Federal Rules of Civil Procedure and, accordingly, that the United States properly may be impleaded. The United States contends, first, that even if a suit for contribution is permissible under the Tort Claims Act, still the United States may not be joined as a third party defendant in a suit between private litigants; and, second, that in any event a suit for contribution is not within the scope of the Federal Tort Claims Act, not being a suit sounding in tort.

We have recently held, in *Sappington* v. *Barrett*, U. S. App. D.C. (decided April 14, 1950), that the United States cannot be joined as a co-defendant, to enforce liability as a joint tort feasor, in a suit between private litigants. In the instant case, we have the parallel question whether the United States can be joined as a third party defendant in such a suit. The United States Court of Appeals for the Third Circuit recently considered both questions—joinder of the United States as a joint tort feasor and its joinder as a third party defendant. It concluded that both types of joinder were permissible. *Howey* v. *Yellow Cab Co.* v. *United States*; *Gutmann* v. *Yellow Cab Co.* v. *United States*,[2] — F. 2d — (decided April 27, 1950).

We are constrained to disagree with the learned judges of the Third Circuit. The Act itself does

[2] The actual question in both cases related to joinder of the United States as a third party defendant.

not deal directly with the question of joinder. The legislative history, however, deals with that question very clearly and positively. And the character and framework of the Act, as well as its legislative history, impel us to the conclusion that the United States has not consented to be joined either as a co-defendant or as a third party defendant in a suit between private litigants.

The Tort Claims Act was passed as one chapter of the Legislative Reorganization Act of 1946. Its purpose was twofold. First, it was to provide convenient administrative and judicial remedies to those injured through the fault of a Government employee. Previously, relief ordinarily could only be secured by obtaining passage of special bills by Congress. The second purpose of the Act was to relieve congressional committees of the overburdening work of considering these special bills, involving as it did the task of determining whether the United States should pay to private persons damages for injuries they had allegedly sustained because of the negligence of employees of the Government. Sen. Rep. No. 1400, 79th Cong., 2d Sess., pp. 29-31. Thus, as a matter of function, in cases under the Tort Claims Act the District Courts are sitting in substitution for congressional committees, i.e., on a basis similar to the Court of Claims. *Drummond* v. *United States*, 78 F. Supp. 730-31. This is suggestive of the type of jurisdiction Congress intended to confer. And the report on House Bill 181, 79th Congress, 1st Session, makes explicit the congressional intent that no person should be permitted "to be joined as a defendant with the United States." House Bill 181 was substantially

identical with the Tort Claims Act as finally passed.[3] The House Committee reporting on that bill said:

> "It is intended that the district courts in exercising jurisdiction under this title shall exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act (act of March 3, 1887, 24 Stat. 505; 28 U.S.C. sec. 41(2). *The bill therefore does not permit any person to be joined as a defendant with the United States* and does not lift the immunity of the United States from tort actions except as jurisdiction is specifically conferred upon the district

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[3] See Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 30; *Brooks* v. *United States*, 337 U. S. 49, 52. The Tort Claims Act has a long legislative history, having been submitted to Congress in many forms and for many years prior to its enactment. See *Brooks* v. *United States*, *supra*, at 51. The report accompanying the Tort Claims Act as finally enacted (Sen. Rep. 1400) was a report on the entire Legislative Reorganization Act, of which the Tort Claims Act was but one of seven titles. Accordingly, Sen. Rep. 1400 contained a relatively brief description of the Act. And, unlike H.R. Rep. 1287, *infra*, which accompanied House Bill 181, Sen. Rep. 1400 makes no specific reference to the problem of joinder. The Court of Appeals for the Third Circuit observed that "the legislative history of the FTCA is inconclusive * * *" It expressed the view, however, that the omission of any reference to joinder in Sen. Rep. 1400 indicated "that it was not the intention of Congress to cause the United States to be treated in a different manner from any private litigant in respect to joinder." *Howey* v. *Yellow Cab Co.*, *supra*. But as we have noted, Sen. Rep. 1400 was not a detailed report; it merely outlined the major features of the Act. And, as has been pointed out, it was recognized in the report that with but one exception of substance, the Act is the same as House Bill 181, discussed in H.R. Rep. 1287, *infra*. We therefore consider it proper to give weight to H.R. Rep. 1287. See *Uarte* v. *United States*, 7 F.R.D. 705, 708-09.

courts by this bill. (See *United States* v. *Sherwood*, 312 U.S. 584 (1941); *Lynn* v. *United States*, 110 F. (2d) 586, 588 (C.C.A. 5th, 1940); *Waite* v. *United States*, 57 C. Cls. 546 (1922); *Jackson* v. *United States*, 27 C. Cls. 74, 84 (1891).) The phrase 'as a court of claims' in section 301 of the Senate bill was deleted as surplusage." (H.R. Rep. 1287, 79th Cong. 1st Sess., p. 5) (Emphasis supplied)

Among the cited authorities in that report was *United States* v. *Sherwood*, 312 U.S. 584. There the question was whether or not a private party could be joined with the United States in a suit under the Tucker Act. The Court of Appeals had held in the affirmative relying among other things on the joinder provisions of the Federal Rules of Civil Procedure. 112 F. 2d 587. The Supreme Court reversed, holding that the United States had not consented to be sued under the Tucker Act along with a private party, and that therefore the District Court lacked jurisdiction of the suit against the United States. It further held that even if the Federal Rules were applicable they merely set out the manner in which jurisdiction was to be exercised and could not confer jurisdiction upon the Federal courts. While the *Sherwood* case is not in the strict sense, controlling, we think its reasoning applicable here.[4] It is true that,

[4] Sec. 411 of the Tort Claims Act provided that practice and procedure shall be in accordance with the Rules of Civil Procedure. When Title 28 was revised and codified, this section was omitted as surplusage, "since other provisions of the title provide that tort claims shall be asserted in civil actions, and that the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions." Sen. Rep. No. 1559, 80th Cong., 2d Sess. (Amendment No. 61.) This deletion makes

unlike the Tort Claims Act, the Tucker Act specifically provided that the District Courts were to have jurisdiction concurrent with the Court of Claims, and that this influenced the Supreme Court's determination that joinder was not permissible. But Congress could not have provided in the Tort Claims Act that the District Courts shall have jurisdiction *concurrent* with the Court of Claims, as it did under the Tucker Act, for the reason that the Court of Claims does not exercise original jurisdiction in tort cases. And, as H.R. Rep. 1287 states, the type of jurisdiction to be exercised was referred to, in bills forming part of the history of the Tort Claims Act, as that of a court of claims. While that reference was deleted in the final draft as surplusage, we think the purpose and framework of the statute demonstrate that the District Courts, under the Act as under its predecessor bills, are sitting substantially as courts of claims.

The Act provides that upon the consent of all appellees an appeal may be taken to the Court of Claims from the District Courts. 28 U.S.C. § 1504. The Supreme Court has said: "The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power 'to pay the debts * * * of the United States' * * *." *United States* v. *Sherwood, supra,* at 587. It seems unlikely that Con-

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clear that Congress, in the Tort Claims Act, did not intend, by reference to the Rules of Civil Procedure, to grant a greater measure of jurisdiction than had been indicated elsewhere in the Act, but merely to make the Rules applicable where jurisdiction existed.

gress intended the Court of Claims to determine judicial controversies between private litigants, something completely outside its normal function. Yet that result might follow from joinder of the United States with other defendants. "To magnify the anomaly, suppose the United States did not appeal, or was successful in the lower court while the other defendants were not, and thus put before the Court of Claims only private litigants." *Drummond v. United States*, 78 F. Supp. 730, 732. These factors are not conclusive. But they gain meaning when we note that as against the United States no jury trial may be had under the Act (28 U.S.C. § 2402 (1950 ed.)), while in suits between private litigants there is ordinarily a jury trial as a matter of right. Therefore, if joinder were permitted, the Court of Claims might have to review jury verdicts, clearly beyond the scope of its usual province, as well as non-jury determinations.

Apart from review by the Court of Claims, the question of jury trials presents a real problem if joinder is permissible. Particularly is this true of joinder of the United States as a third party defendant. In the present suit, for example, the United States would be permitted under the Rules of Civil Procedure (Rule 14a) to assert, in addition to its own defenses against a third party plaintiff, any defenses against the plaintiff's claim which the third party plaintiff may have. This opens up the possibility of the court and jury reaching opposite conclusions on the same questions. For the jury might find the defendant (third party plaintiff) liable to the plaintiff, finding against the third party plaintiff on all defenses asserted, while the court, at the same

time, absolved the United States (third party defendant) of liability, finding, on the identical defenses, that the third party plaintiff was not liable to the plaintiff and, accordingly, that there was no right of contribution. Paradoxical possibilities of this sort are certainly indicative that Congress did not intend to permit such joinder.

Appellants contend that because the Act provides that the liability of the United States is to be the same in manner and extent as that of a private individual (28 U.S.C. § 2674) it must follow that the United States can be joined as third party defendant in litigation where a private person would be amenable to such joinder. This contention has much force, *in vacuo*. But when the provision is read within the framework of a comprehensive scheme permitting suit against the Government, and with due consideration of legislative history, it becomes clear that the reference is only to "the jurisdiction of the claim and the liability of the claim," and not to "other incidents of litigation," such as the susceptibility of the United States to be joined in a suit between private parties. *Drummond* v. *United States, supra,* at 731. This is borne out by the fact that, in the very paragraph spelling out the liability of the United States, Congress provided that trial against the United States should be by the court without a jury, whereas, as we have noted, between private litigants jury trial is of right. Section 410 of the Act, now 28 U.S.C. § 2402. The Act also provides a different rule as to venue than is the case in suits between private litigants. Compare 28 U.S.C. § 1402 (b) with § 1391. And a special statute of limitations. 28 U.S.C. § 2401. The reference to liability merely means that the same

substantive law should govern the question whether an employee of the United States had committed a tortious act for which the United States was responsible, and that the same measure of damages should be applicable, as if the United States were a private party. Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 32.

Thus, whether we approach the problem as one of merely interpreting the face of the statutory language, or whether we go behind that language to the history of the Act, we must reach the same conclusion, namely, that Congress did not intend the United States to be joined as a third party defendant. In our view, therefore, the Tort Claims Act does not permit the joinder of the United States, either as a co-defendant (*Sappington* v. *Barrett, supra*), or as a third party defendant, in a suit between private litigants.

Joinder of parties is ordinarily no more than a question of procedure, and Rule 21 of the Federal Rules of Procedure provides that misjoinder of parties is not grounds for dismissal of an action. But in suits against the United States, such as the present, a different principle prevails. For the United States may only be sued in the manner and according to the procedure to which it has consented. The statute waiving sovereign immunity creates the bounds of the jurisdiction of the Federal courts in entertaining suit against the United States. *United States* v. *Sherwood, supra.*

The Supreme Court has recently held that an insurance company can sue under the Tort Claims Act in its own name, on a claim to which it had become subrogated by reason of payments to the

insured. *United States* v. *Aetna Casualty & Surety Co.*, — U.S. —, 18 U.S.L. WEEK 4060, 4064, decided December 12, 1949. In that case, Chief Justice Vinson, speaking for the court, said:

> "We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N.Y. 140, 147: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.' "

The holding of the Supreme Court in the *Aetna* case represented a broad construction of the Act. But it was one which was amply supported by the purpose, structure and legislative history of the statute. In the present case, even applying the generous view laid down for us in the *Aetna* decision, we find that purpose, structure and history lead us to but one result—a result unfavorable to joinder.

Since we hold that the District Court had no jurisdiction to entertain the third party complaint, we need not here decide whether, in a separate action, appellant here may enforce whatever right to contribution it may have against the United States. Accordingly, without prejudice to the maintenance of such a suit, the judgment of the District Court dismissing the third party complaint is

Affirmed.

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